

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

LAWRENCE E. WHITMER, :
 :
 Plaintiff, : Case No. 3:14cv407
 :
 vs. : JUDGE WALTER H. RICE
 :
 COMMISSIONER OF SOCIAL SECURITY, :
 :
 Defendant. :

DECISION AND ENTRY REJECTING REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (DOC. #11) IN PART AND NOT RULING ON SAME IN PART; PLAINTIFF'S OBJECTIONS TO SAID JUDICIAL FILING (DOC. #12) SUSTAINED IN PART AND NOT RULED UPON IN PART; JUDGMENT TO BE ENTERED IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT COMMISSIONER, VACATING COMMISSIONER'S DECISION THAT PLAINTIFF WAS NOT DISABLED AND, THEREFORE, NOT ENTITLED TO BENEFITS UNDER THE SOCIAL SECURITY ACT, AND REMANDING THE CAPTIONED CAUSE TO THE DEFENDANT COMMISSIONER, PURSUANT TO SENTENCE FOUR OF 42 U.S.C. § 405(g), FOR FURTHER ADMINISTRATIVE PROCEEDINGS ON LIMITED ISSUE; TERMINATION ENTRY

Plaintiff has brought this action pursuant to 42 U.S.C. § 405(g) to review a decision of the Defendant Commissioner denying Plaintiff's application for Social Security disability benefits. On February 10, 2016, the United States Magistrate Judge filed a Report and Recommendations (Doc. #11), recommending that the Commissioner's decision that Plaintiff was not disabled and, therefore, not entitled to benefits under the Social Security Act be affirmed. Based upon the following reasoning and citations of authority, as well as upon a thorough de novo review of this

Court's file, including the Administrative Transcript (Doc. #6), and a thorough review of the applicable law, this Court rejects the aforesaid Report and Recommendations in part and does not rule upon same in part and, in so doing, orders the entry of judgment in favor of the Plaintiff and against Defendant Commissioner, concluding that the Commissioner's decision that Plaintiff was not disabled and, therefore, not entitled to benefits under the Social Security Act must be remanded for further consideration of whether the Defendant Commissioner is bound by the doctrine of res judicata as set forth in Drummond v. Commissioner of Social Security, 126 F.3d 837 (6th Cir. 1997), and its progeny. The Plaintiff's Objections to said judicial filing (Doc. #12) are sustained in part and not ruled upon in part. Accordingly, the decision of the Defendant Commissioner that Plaintiff was not disabled and, therefore, not entitled to benefits under the Social Security Act is vacated and the captioned cause remanded, pursuant to Sentence Four of 42 U.S.C. § 405(g), to the Defendant Commissioner for further administrative proceedings upon the limited issue of whether the Commissioner is bound by the doctrine of res judicata.

In addition to the foregoing, in ruling as aforesaid, this Court makes the following, non-exclusive, observations:

1. This Court makes no finding on whether the Commissioner's decision that Plaintiff failed to meet Listing 12.05 was supported by substantial evidence. As a result, this Court makes no finding as to whether the Magistrate Judge was correct in finding that said decision of the Defendant Commissioner was likewise supported by substantial evidence.

2. This Court's declining to rule upon the above issue is based upon the fact that, regardless of how one might rule upon same, remand must be had upon the threshold issue of res

judicata. Under Drummond, the burden is on the Commissioner to prove the changed circumstances with regard to the Plaintiff, as the means to escape the principles of res judicata. Plaintiff raised the issue of res judicata, contending that it was inapplicable, in his Statement of Specific Errors (Doc. #7, at 13-15). Moreover, while the ALJ arranged to have Plaintiff's prior claim file, presumably that upon which the 2010 finding of non-disability was based, forwarded to the appropriate office for review, there is absolutely no discussion by the Administrative Law Judge in his opinion (Doc. #6-2) of either what that review revealed or, for that matter, upon what information he based his conclusion that the 2010 finding of non-disability precluded the application of res judicata. The Administrative Law Judge's entire discussion of res judicata is contained within one paragraph on page 1 of the decision which forms the basis of this appeal. Although he states that he reviewed the entirety of the record, this Court cannot discern whether the ALJ was referring to the entire record of this present application, the record leading to the 2010 determination of non-disability or both. Therefore, this Court cannot determine whether the Commissioner has properly applied the doctrine of res judicata. For that reason, although Plaintiff properly puts the burden upon the Commissioner, on the issue of res judicata, pursuant to Drummond, he fails to address the effect of Plaintiff's failure to appeal the decision of non-disability from the 2010 application on whether the doctrine of res judicata is even available to assist him with regard to the application for benefits currently before this Court. Accordingly, this Court needs a developed record on this issue.

WHEREFORE, based upon the aforesaid, this Court rejects the Report and Recommendations of the United States Magistrate Judge (Doc. #11) in part and does not rule upon

same in part, having concluded that it cannot determine whether the Commissioner properly declined to apply the doctrine of res judicata to the Plaintiff's application before this Court. Accordingly, Plaintiff's objections to said judicial filing (Doc. #12) are sustained in part and not ruled upon in part. Judgment will be ordered entered in favor of the Plaintiff and against Defendant Commissioner herein, vacating the decision of the Defendant Commissioner that Plaintiff was not disabled and, therefore, not entitled to benefits under the Social Security Act, and remanding the captioned cause to the Defendant Commissioner, pursuant to Sentence Four of § 405(g), for further administrative proceedings to allow the Commissioner to present to this Court, should ultimate review on the issue be necessary, facts, reasoning and conclusions on whether the Commissioner properly declined to apply the doctrine of res judicata as explicated under Drummond and its progeny.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

March 23, 2016



WALTER H. RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:

Counsel of record